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No. 483

In the

Supreme Court of the United States

OCTOBER TERM, 1969

ATLANTIC RICHFIELD COMPANY, et al.,
Petitioners,

v

W. O. HILTON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the 12th Supreme Judicial District of Texas at Tyler

BRIEF FOR RESPONDENTS IN OPPOSITION

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---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents W. O. Hilton and wife, Malvrin Hilton, L. A. McCoy and wife, Ila Mae McCoy, and Willis D. Moore pray that the Petition for Writ of Certiorari filed herein by Atlantic Richfield Company, John W. Melton and wife, Virgie Melton, C. L. Hanna, Frances Walker McCain, Edson Petroleum Company, Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee for Empire Trust Company, Empire Trust Company, E. Fred Hersch-

bach, Fredrick J. Herschbach and Robert A. Herschbach be denied by this Court.

OPINIONS BELOW

(1) Opinion of the Court of Appeals for the Fifth Circuit in *W. O. Hilton, et al, Appellants v. The Atlantic Refining Company, et al, Appellees* is reported at 327 F 2d 217. The Opinion is printed in Petitioners' Appendix A, pps. 1-4.

(2) The Opinion of the Court of Civil Appeals for the 12th Supreme Judicial District of Texas in *The Atlantic Refining Company, et al, Appellants v. W. O. Hilton, et al, Appellees* is reported at 437 S.W. 2d 347. The Opinion is printed in Petitioners' Appendix B, pps. 5-21.

JURISDICTION

(1) Recitations of Paragraph 1 under "Jurisdiction" found at Page 2 of the Petition for Writ of Certiorari set forth the dates of the various proceedings in the State Courts below.

(2) This Court does not have jurisdiction of this cause because no substantial Federal question arising under the Constitution, treaties or laws of the United States is involved nor has any title, right, privilege or immunity been specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. Therefore Petitioners' attempt to invoke jurisdiction of this Court under Federal Statute 28 USC Section 1257 (3) must fail.

QUESTIONS PRESENTED

Petitioners assert that five Federal questions are presented, each arising out of the effect given certain stipulations entered into by counsel for the parties in the Federal District Court *after* that Court denied Respondents' Motion to Remand and prior to the holding of the Court of Appeals for the Fifth Circuit that said Federal District Court should have granted Respondents' Motion to Remand because the Federal District Court was without jurisdiction for want of diversity. For the reasons shown hereafter it is clear that no rights arising under the authority of the United States, the full faith and credit clause of the United States Constitution, the due process clause of the United States Constitution or Federal statutes and procedural rules, as claimed by Petitioners, exist, nor were any such claimed rights raised in the State Court below nor decided by the State Court below and this Court is, therefore, without jurisdiction.

STATEMENT

This suit was filed by Respondents W. O. Hilton and wife Malvrin Hilton and L. A. McCoy and wife Ila Mae McCoy (who are citizens of the State of Texas) in the District Court of Henderson County, Texas on November 22, 1961 against Atlantic Refining Company (now Atlantic Richfield Company) to remove the cloud on their title created by a pooling declaration filed by Atlantic Richfield Company which pooling declaration purported to pool and Oil and Gas Lease covering said Respondents' land located in Henderson County, Texas (Petitioners' Appendix E, Pages 26-28).

(1) Atlantic Richfield Company removed the suit to the U. S. District Court on the grounds of diversity of citizenship. Respondents filed a Motion to Remand the cause to the State Court on the ground that the suit involved interests owned by royalty owners in the pooled unit who were not presently parties to the suit whose joinder would destroy diversity and the jurisdiction of the Federal Court (Petitioners' Appendix G. Page 33-34).

(2) The Federal District Court denied Respondents' Motion to Remand to which denial Respondents excepted. Subsequent to the denial of Respondents' Motion to Remand certain Stipulations were entered into by the counsel for the respective parties which Stipulations were essentially a summary of the contents of various instruments, Texas Railroad Commission orders, and other documents which had been introduced in evidence and a recitation that the ultimate contested issue was the validity of the subject Oil and Gas Lease then owned by the Atlantic Richfield Company (Petitioners' Appendix I, Pages 44-45).

(3) The Federal District Court then proceeded to hear said case on its merits and held that the subject lease was valid and subsisting and that Atlantic Richfield Company recover title and possession of the subject Oil and Gas Leasehold estate (Petitioners' Appendix, Pages 64-66).

(4) Respondents perfected their appeal to the Court of Appeals for the Fifth Circuit and the Fifth Circuit held that certain necessary and indispensable parties were absent, whose joinder would destroy diversity of the Federal District

Court. The Fifth Circuit therefore reversed the judgment of the Federal Court below with directions to remand the subject case to the State Court.

(5) The case was then tried in the State Court on amended pleadings of both Respondents and Petitioners. All parties filed Motions for Summary Judgment and the State District Court held that Respondents should recover title and possession of the mineral fee estate in the subject land except as to certain royalty interests.

(6) The State Court of Civil Appeals affirmed the judgment of the State District Court. Petitioners' Application for Writ of Error to the Supreme Court of Texas was refused, no reversible error, and Petitioners' Motion for Rehearing on such Application was overruled (Petitioners' Appendix C, Page 22).

(7) Petitioners filed in the State Court of Civil Appeals a Motion to Stay the Mandate pending petition for Writ of Certiorari to the Supreme Court of the United States which Motion was granted by the State Court of Civil Appeals.

ARGUMENT

I.

PETITIONERS ACQUIRED NO RIGHTS ARISING UNDER THE CONSTITUTION, TREATIES, OR STATUTES OF, OR COMMISSION HELD OR AUTHORITY EXERCISED UNDER, THE UNITED STATES BY VIRTUE OF THE STIPULATIONS ENTERED INTO IN THE FEDERAL DISTRICT COURT.

Petitioners seek to invoke the jurisdiction of this court to protect rights under the Constitution, treaties or statutes

of, or commission held or authority exercised under, the United States ("federal rights") claimed by Petitioners to have been acquired (A) under the stipulations contained in the pre-trial order entered by the Federal District Court, or (B) under the judgment of the Court of Appeals for the Fifth Circuit remanding the cause to the State Court because, Petitioners contend, the stipulations formed the basis of that judgment. Neither of Petitioners' contentions can be sustained.

A. Petitioners acquired no "federal rights" by virtue of the stipulations contained in the pre-trial order entered by the Federal District Court for two reasons:

(1) The pre-trial order *expressly* provided that "* * * heretofore on June 26, 1962, the Court heard Plaintiffs' Motion to Remand this cause to the District Court of Henderson County, Texas, and said Motion was in all things denied and overruled to which action of the Court the Plaintiff duly excepted, *and all stipulations herein contained are subject to said Plaintiffs exceptions.*"

As Respondents' approval of the pre-trial order was expressly subject to their Motion to Remand, such approval was withdrawn upon the sustaining of the Motion to Remand by the Fifth Circuit. It is therefore clear that the pre-trial order (and the stipulations contained therein) were thereafter without effect as to either Respondents or Petitioners.

(2) Secondly, Petitioners acquired no "federal rights" under the pre-trial order containing the stipulations, because

(as later held by the Fifth Circuit), the Federal District Court lacked jurisdiction to enter the pre-trial order.

After remand it was, of course, for the State Court to determine what should be done with, and the effect of, pleadings and papers filed and testimony taken during the pendency of the suit in Federal Court. *Ayres v. Wiswall*, 112 U.S. 187; see *Tracy Loan & Trust Co. v. Mutual Life Ins. Co.*, 79 Utah 33, 7 P. 2d 279; 76 C.J.S. 1160 Removal of Causes §313; *Seeligson's Exrs. v. Texas Transp. Co.*, 70 Tex. 198, 7 S.W. 708.

This rule is inherently sound, for if it were otherwise, any removal case remanded to State Court by a United States Court of Appeals could become a patchwork of inconsistent Federal and State decisions based on the holdings of the various judges and the differing procedural rules in the two jurisdictions. Manifestly a Plaintiff's right to try a cause of action in a State Court entirely under State procedure, where the cause is not properly removable, is just as valuable as the right of a Defendant to try a properly removable cause in Federal Court.

Petitioners' arguments about the pre-trial order were expressly considered — and rejected — by the Texas Court of Civil Appeals. In refusing Petitioner's Application for Writ of Error "no reversible error" (12 Tex. Sup. Ct. Journal 376) and denying Petitioners' Motion for Rehearing (12 Tex. Sup. Ct. Journal 448) the Supreme Court of Texas necessarily rejected Petitioners' arguments.

B. Petitioners could have acquired no "federal rights" by virtue of the judgment of the Court of Appeals for the Fifth Circuit remanding this cause to State Court, because such stipulations *did not form the basis* of such decision to remand and there was no holding of the Court of Appeals for the Fifth Circuit to that effect.

The basic contention of Petitioners (found at Page 16 of the Petition for Writ of Certiorari) is that the judgment of the Fifth Circuit gave them a "federal right" because that Court decided the question of remand

> "* * * *based upon what was stipulated by the parties* under approval of federal court that the lease was in production and pooled subject to sufficiency of lease description. *Holding by U. S. 5th Circuit Court that its decision was made because lease was in production and pooled was element in favor of and under which Respondents claim.* The state court allowed Respondents to repudiate the stipulations and refused to give effect to the stated basis of the judgment of the Federal Court." (Petition for Writ of Certiorari, Page 16). (Emphasis added)

The stipulations relied on by Petitioners as the basis for the Fifth Circuit holding, set forth in Item 3, Page 11 of the Petition for Writ of Certiorari, are as follows:

> (1) "* * * Atlantic had drilled a producing oil well within the pooled unit but off the lease, * * *"
>
> (2) "* * * had made the declaration of unit 'whereby a 160 acre unit was formed for the production of oil' * * *"
>
> (3) "* * * 'whereby there was pooled and combined exactly 80 acres from the J. W. Melton lease and exactly

80 acres from the W. O. Hilton, et al lease making the total of 160 acres,' * * *"

(4) "* * * the remaining 2.713 acres 'has been pooled as a part of' a 160 acre oil unit on the South * * *"

(5) "* * * the contested issues related to the sufficiency of the land description in the lease."

Passing the question whether the Petitioners' theory that such stipulations created a "federal right" is valid, they cannot reach their desired result because the above five stipulations clearly were not the basis for the order of remand entered by the Fifth Circuit.

At no point, either expressly or by implication, does the opinion of the Fifth Circuit refer to the stipulations or to the pre-trial order (Petitioners' Appendix A, Pages, 1-4). However, that Court's opinion *does* state that:

"Evidence on appellants' motion to remand was heard and denied, * * *" (Petitioners' Appendix A, Page 2).

An examination of the evidence heard by the Federal District Court at the hearing on the Motion to Remand establishes beyond question that the pre-trial order (containing the stipulations set forth above and relied on by Petitioners) was not, in fact, the basis of the judgment of the Fifth Circuit, because all of the "facts" (which were really nothing more than a summary of the contents of various instruments, Texas Railroad Commission Orders, and the like) contained in the above stipulations were in evidence before the Federal District Court when the Motion to Remand was heard.

Each of the facts contained in the stipulations referred to above appear in the Record of the Hearing on Plaintiffs' Motion to Remand as follows:

(1) "* * * Atlantic had drilled a producing oil well within the pooled unit but off the lease, * * *" (Respondents' Appendix, Page 11);

(2) "* * * had made the declaration of unit 'whereby a 160 acre unit was formed for the production of oil' * * *" (Respondents' Appendix, Page 4);

(3) "* * * 'whereby there was pooled and combined exactly 80 acres from the J. W. Melton lease and exactly 80 acres from the W. O. Hilton, et al lease making the total of 160 acres,' * * *" (Respondents' Appendix, pages 4, 5, 6, and 7);

(4) "* * * the remaining 2.173 acres 'has been pooled as a part of' a 160 acre oil unit on the South * * *" (Respondents' Appendix, Page 4);

(5) "* * * the contested issues related to the sufficiency of the land description in the lease". (Respondents' Appendix, Page 40).

As the approval by Respondents of the pre-trial order (containing the stipulations) added nothing whatsoever to the record previously made on the hearing on the Motion to Remand, neither such pre-trial order nor the stipulations therein could have formed the "basis" for the order of remand entered by the Court of Appeals for the Fifth Circuit.

The sole question to be decided by the Court of Appeals for the Fifth Circuit was whether or not the Federal District Court should have remanded the case to the State Court. The sole holding of the Court of Appeals for the Fifth Circuit was that the District Court did not have jurisdiction and the cause must be remanded to the State

Court. All references by Petitioners to statements in that opinion are references to dicta and obiter dicta and cannot form the basis of any character of "federal right" as asserted by Petitioners.

II.

NO SUBSTANTIAL FEDERAL QUESTION HAS BEEN RAISED AS REQUIRED BY FEDERAL STATUTE 28 USC SECT. 1257(3)

Even if the facts asserted by Petitioners were construed to create a Federal question (and Respondents submit that it is clear that no such Federal question exists) Petitioners have failed to raise a substantial Federal question in the manner required to bring the case under the jurisdiction of this Court. *Zucht v. King*, 260 U.S. 174, 176, 177.

Petitioners assert that a Federal question was seasonably raised:

(1) in the State District Court by various pleadings referred to on Pages 14 and 15 of the Petition for Writ of Certiorari;

(2) in the State Court of Civil Appeals by Points of Error Nos. 1, 2, 3 and 7 in Petitioners' Brief (Petitioners' Appendix X, Pages 106-108 and Y, Pages 109-110);

(3) in the State Court of Civil Appeals by Points of Error Nos. 1-15 and No. 40 in their Motions for Rehearing (Petitioners' Appendix Z, Pages 111-118, and Z-1, Pages 119-120;

(4) in the Supreme Court of Texas by Points of Error Nos. 1, 2, 3, 4 and 13 in their Application for Writ of Error (Petitioners' Appendix C, Pages 22-23);

(5) in the Supreme Court of Texas by Assignments of Error Nos. I, II and V in their Motion for Rehearing (Petitioners' Appendix Z-3, Pages 125-127); and

(6) by the recitations in the opinion of the State Court of Civil Appeals, 437 S.W. 2d 347 at Page 351, as reprinted on Pages 9-11 of Petitioners' Appendix B.

As to Items (1) through (4) above Petitioners' contentions are unfounded and without basis for two reasons:

(1) The State District Court pleadings referred to merely contain exceptions to the pleadings of Plaintiffs (Respondents here) and assert various grounds of "estoppel" of Plaintiffs (Respondents here) which clearly have no reference to "Federal questions".

(2) A simple reading of the Points of Error addressed to the State Court of Civil Appeals, referred to in Item (1) through (4) above, make it abundantly clear that they do not raise a Federal question. Those Points of Error are generally based on a claimed right of estoppel of some nature. Nowhere do Petitioners show, as of course they cannot, that estoppel is a Federal question under the purview of the due process clause of the United State Constitution.

The failure of Petitioners to raise any "Federal question" in the State Courts defeats jurisdiction of the Supreme

Court of the United States. In re *Lamkin*, 355 U.S. 59; *Ferguson v. Georgia*, 365 U.S. 570.

Assignments of Error Nos. I and III in the State Supreme Court, referred to in Item (5) above, likewise fail to raise a Federal question. In assignment of Error V Petitioners do, for the first time, properly frame a Federal question but such raising of the Federal question comes too late under the clear authority established by the United States Supreme Court that where a Federal question is attempted to be raised for the first time by a Petition or Motion for Rehearing in the highest court of a State, and the State Court, in denying the Petition or Motion for Rehearing, makes no reference to the Federal question, there is no basis for a Writ of Certiorari from the Supreme Court of the United States. *McMillen v. Ferrum Mining Co.*, 197 U.S. 343; *Wall v. Chesapeake & O.R. Co.*, 256 U.S. 125; *Citizens National Bank v. Durr*, 257 U.S. 99; *Radio Station WOW v. Johnson*, 326 U.S. 120.

The only remaining "basis" asserted by Petitioners in seeking to establish that a Federal question has been raised is their contention that such question was raised by the following language from the opinion of the Court of Civil Appeals of Texas (Petitioners' Appendix B, Pages 9-11):

> "* * * (1) It seems to be a well established rule of law that stipulations of counsel with respect to the construction and legal effect of unambiguous contracts are not binding on either the court or the parties. [cites authorities]
>
> (2) There was no claim that the lease was ambiguous. Under the above cited authorities, since the stipulated

> issues before the Federal Court involved only a question of law, appellees were not barred or foreclosed from thereafter amending their pleadings and proving that, as a matter of law, the Atlantic-Hilton Lease had terminated because of improper exercise of the pooling provision under the doctrine of Jones v. Killingsworth, supra. These points are overruled."

The language quoted above clearly demonstrates that the Court of Civil Appeals of Texas did not have before it, and did not decide any "Federal question" but rather, simply interpreted the legal effect to be given to stipulations of counsel as to certain matters of law. The Court of Civil Appeals referred only to the common law doctrine concerning the binding effect of stipulations entered into by counsel and general provisions of Texas land law. Respondents submit that this does not constitute the raising of a substantial Federal question.

Respondents assert that it is clear that the State Court pleadings, Points of Error and Assignments of Error do not satisfy the requirement of Federal Statute 28 USC Section 1257(3) that any title, right, privilege or immunity under the Constitution, treaties or statute of, or commission held or authority exercised under, the United States must be "* * * specially set up or claimed * * *" and that therefore Petitioners have never raised a substantial Federal question which could bring this case under the jurisdiction of this Court.

It is equally certain that such pleadings, Points of Error and Assignments of Error do not contain the slightest inference that would suggest to the State Court that Petitioners

were relying on any Federal Statute or Federal Constituional provision or authority exercised under the United States. Petitioners (with the one exception of their Assignment of Error V included in their Motion for Rehearing in the Supreme Court of Texas) have done nothing more than to assert time after time that the effect of the stipulations was to contractually bind or estop Respondents from amending their pleadings or contending that the subject lease was invalidly pooled. Clearly this is not sufficient to constitute the raising of a substantial Federal question either directly, by inference or implication, or by necessary intendment and since no substantial Federal question was raised this Court will not accept jurisdiction.

III.

THE DECISIONS OF THE STATE COURTS COMPLAINED OF BY PETITIONERS REST ON ADEQUATE INDEPENDENT STATE GROUNDS.

Respondents have heretofore quoted the holding of the Court of Civil Appeals of Texas asserted by Petitioners to be the basis of the depreviation of "federal rights" acquired by them. As discussed above the Court of Civil Appeals of Texas did not have before it, and did not decide, a Federal question. That court merely held that the stipulations relied on by Petitioners were as to matters of law and therefore, not binding on either the court or the parties. It clearly appears, therefore, that the aspect of the case relied upon by Petitioners was disposed of upon a rule of common law (general jurisprudence) and it is well established that where the decision of the State Court is made upon rules of common

law (general jurisprudence) or upon grounds sufficiently broad to sustain the judgment without consideration of the Federal question, the United State Supreme Court will not take jurisdiction. *New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79.

There is no showing, or suggestions made, that the decision of the State Court would have been different in any respect had the stipulations been entered into in the State Court proceedings rather than in a Federal Court (which Court was later determined to be without jurisdiction). Any issue as to the effect of the stipulations was disposed of by the Court of Civil Appeals by its express holding that under the circumstances cited, such stipulations were, as a rule of common law (general jurisprudence), not binding on the court or the parties, and it is clear that where such a non-Federal ground controls the determination of the question before the State Court, the United States Supreme Court will not review the State Court decision. *Hale v. Akers*, 132 U.S. 554.

IV.

STATE COURTS DID NOT REFUSE TO GIVE FULL FAITH AND CREDIT TO ORDER OR JUDGMENT OF FEDERAL COURTS

Petitioners' contention that the judgment of the Texas Court of Civil Appeals refused to give full faith and credit to the approval of the stipulations by the Federal District Court and to the judgment of the Fifth Circuit (Petition for Writ of Certiorari, Page 7) is without merit. As was shown above,

the pre-trial stipulation in the Federal District Court was expressly subject to Respondents' exception to the overruling of the Motion to Remand and when the judgment was reversed by the Fifth Circuit for lack of jurisdiction, the stipulations had no further force and effect.

The judgment of the Fifth Circuit (327 F. 2d 217) dealt exclusively with the existence of resident indispensable parties and held that the joinder of these indispensable parties would destroy the necessary diversity for purpose of jurisdiction. It ordered the remand of the case to the State Court, citing Judicial Code §1447(c) which directs such an action "if * * * it appears that the case was removed improvidently and [the District Court] was without jurisdiction * * *". Therefore there can be no possible question of refusal to give full faith and credit to this judgment.

REASONS WHY WRIT SHOULD BE DENIED

1. Petitioners' claim that a substantial Federal question is presented to this Court is based solely on the effect of certain stipulations entered into under a pre-trial order in the Federal District Court which Court was later determined to have been without jurisdiction. Such stipulations were not only expressly subject to Respondents' Motion to Remand and therefore of no further force and effect when the Fifth Circuit held that the Motion to Remand should have been granted, but furthermore, as a matter of law, it was for the State Court to determine the effect to be given the stipulations

when the cause was remanded to the State Court. Therefore no Federal question exists.

2. Petitioners did not properly frame or raise a Federal question in the State Court proceedings until Petitioners' Motion for Rehearing filed in the highest Court of the State and under clear authority this Court will not accept jurisdiction of a case where a Federal question is raised for the first time at that stage of the proceedings. In any event the Federal question sought to be framed and raised in said Motion for Rehearing was not a substantial Federal question even if said question had been timely raised.

3. No substantial Federal question was discussed or decided by any of the State Courts below.

4. The sole question before the Court of Appeals for the Fifth Circuit was the question of diversity of citizenship to support Federal Court jurisdiction and the sole holding of that Court was that such diversity did not exist. Petitioners' assertions that the State Courts denied full faith and credit to that judgment on the ground that the Court of Appeals for the Fifth Circuit "held" that the subject lease had been validly pooled is absolutely without basis.

5. The judgments of the State Courts below were based on adequate and substantial independent State grounds involving principles of common law (general jurisprudence) and the application of general principles of the Texas law governing title suits concerning real property situated in the State of Texas and where a State Court judgment is based on such substantial non-Federal grounds this Court will not accept

jurisdiction to review a Federal question even if properly framed and raised.

7. The Petition for Writ of Certiorari does not comply with any criteria of Rule 19 of the United States Supreme Court rules concerning the considerations governing review by this Court of State Court decisions on certiorari. The State Court has not decided a Federal question of substance not theretofore determined by this Court nor has it decided such a question in a way probably not in accord with applicable decisions of this Court.

APPENDIX

Appendix is filed under separate cover herewith.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that copies of this Brief have been served upon counsel of record for Petitioners by enclosing copies in sealed envelopes and depositing same in the United States Post Office at Dallas, Texas, with first-class postage prepaid and sent by Certified mail, and addressed to counsel of record at their post office addresses as follows:

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Dated this 30th day of September, 1969.

Edward Kliewer, Jr.

Edward Kliewer, Jr.
Attorney for Respondents